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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 710.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

ERWIN N. GRISWOLD,
HOLT S. MCKINNEY,
Counsel for the Respondent.

THE COURT PRESS, N. Y. C.

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ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, Executor.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Tax Court (R. 61-67) is reported at 1 T. C. 478. The opinion of the Circuit Court of Appeals (R. 79-81) is reported at 144 F. (2d) 272.

Jurisdiction.

The date on which the judgment of the Circuit Court of Appeals was entered is discussed in Point I of the brief (*infra*, pp. 4-9). The petition for a writ of certiorari was filed on November 29, 1944. The jurisdiction of this Court is invoked by the petitioner under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The respondent in the brief below suggests that the petition was not filed within the time prescribed by §8(a) of the Act of February 13, 1925.

Question Presented.

The statement of the question in the petition has certain connotations which are not actually involved in the case. A more accurate statement of the question presented is as follows:

Whether money received by the respondent from a corporation in which it owned stock, as a part of a tax-free recapitalization of the corporation, had "the effect of the distribution of a taxable dividend" within the meaning of §112(c)(2) of the Revenue Act of 1936.

Statutes Involved.

The statutes involved are set forth at pages 16-20 of the petition, and need not be repeated here.

Statement.

The facts in this case were all stipulated (R. 14-60). They may be summarized as follows:

Edward T. Bedford died on May 21, 1931. Included in his estate were 3,000 shares of 7% cumulative preferred stock of Abercrombie and Fitch Company (par value of $100 per share). The fair market value of these 3,000 shares on the date of the decedent's death was $210,000 (R. 14).

Because of business conditions prevailing in the following years, the Abercrombie and Fitch Company incurred losses with the result that its surplus account showed an accumulated deficit on January 31, 1936 of $399,771.87. Included in the charges against surplus were the amounts capitalized by three stock

dividends paid in 1920, 1928 and 1930, aggregating $844,100 (R. 16, 59-60).

Because of the existence of the deficit on the company's books its credit was affected, and it had been unable for over five years to pay any dividends on either its preferred or common stock (R. 21-22). Accordingly, a Plan of Recapitalization was proposed and submitted to the stockholders for their consideration and approval (R. 14-15, 25-26). The plan was adopted by the shareholders at a meeting held on December 8, 1936, and was accordingly put into effect (R. 14-15).

In accordance with the Plan of Recapitalization, the petitioner, as executor of the estate of Edward T. Bedford, received in January, 1937, in exchange for its 3,000 shares of 7% cumulative preferred stock ($100 par value), the following: 3,500 shares of new cumulative preferred stock of a par value of $75 per share and an annual dividend of $6 per share; 1,500 shares of the common stock of the company with a par value of $1 per share; and cash in the amount of $45,240. Thus the respondent gave up securities with an aggregate par value of $300,000, and received securities with an aggregate par value of $264,000.[1] The aggregate fair market value of the property and cash received on January 15, 1937, was $349,740 (R. 15).

For the taxable year ended January 31, 1937, the Abercrombie and Fitch Company had net earnings after taxes of $309,073.70 (R. 16).

[1] Prior to the recapitalization, the capitalization of Abercrombie and Fitch Co. was $2,000,000 in preferred stock, plus common stock with a stated value of $500,000. After the recapitalization, the capital consisted of $1,575,000 in preferred stock, and $100,000 in common, or an aggregate of $1,675,000 (R. 25).

I.

Was the petition filed on time?

We seriously question whether the petition in this case was filed on time. Under the statute (§8(a) of the Act of February 13, 1925, 43 Stat. 936, 940), the application must be filed "within three months after the entry of such judgment or decree." This requirement is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417-418.

The petition was filed on November 29, 1944. This was within three months after August 29, 1944, on which date the Court below entered its "order for mandate" (R. 82). If this order for mandate was the judgment of the Court below within the meaning of the Act of February 13, 1925, then the petition was filed on time. If any prior action of the Court was its judgment, then the petition was not filed on time.[2]

We submit that the order for mandate was not the judgment of the Court below, but that it was, on the contrary, just what its title indicates, namely, the order for the issuance of the mandate. The issuance of the mandate has nothing to do with the judgment itself, except that it must be rested upon a previously entered judgment. Therefore, the "order for mandate" rather connotes that it is not the judgment, but that a judgment has been previously entered.

The opinion in this case was filed on August 8, 1944. We recognize, of course, that the opinion as such is not the judgment of the Court. Nevertheless, the opinion in this case, filed with the Clerk of the Court

[2] No petition for rehearing was filed, or other action taken which would suspend the running of the three-months' period.

below on August 8, 1944, concludes with the following entry: "The order of the Tax Court is reversed" (R. 81). It should be noted that the statement is that the order *is* reversed, not that it will be or should be, nor that counsel should submit an order in conformity with the opinion. The statement purports to be a final act: the order is reversed.

On the same date, the Clerk made an entry in his records reading as follows:[3]

> "Aug. 8, 1944. Order reversed. A. N. Hand, *C. J.*"

This appears to be a definite statement in the record that the order is reversed on August 8, 1944. The significance of this entry stands out when the entries for August 29th are examined. These read as follows:

> "Aug. 29, 1944. Filed order for mandate.
> Aug. 29, 1944. Issued mandate."

These entries show the filing of an order for mandate on August 29th, and the issuance of the mandate on the same day. But neither the order for the mandate, nor the actual issuance of the mandate would seem to be the judgment.[4] The judgment is the definitive act of the Court, and that would seem to be recorded by the entry for August 8, 1944. Indeed, that is the only entry in the docket which connotes a judgment.

It is true that the order for mandate contains lan-

[3] See the Certificate by the Clerk of the Circuit Court of Appeals, which is printed in the Appendix. The original has been filed with the Clerk of this Court.

[4] Cf. the practice of this Court under which it occasionally orders that the mandate "shall issue forthwith". It is clear that such an order is not itself the judgment of this Court, but follows upon the previous entry of a judgment.

guage which reads like that often used for the entry of a judgment. But that is not important if the judgment was actually rendered at an earlier date. That the earlier order is in fact the judgment becomes clearer when the circumstances surrounding the order for mandate are considered. It is simply a loose sheet of paper kept in a filing cabinet along with the other papers, including correspondence, relating to the case. It is not entered in any bound record of the Court. It is not entered pursuant to any express direction of the Court, but is entered by the Clerk himself at what he considers to be a convenient time. In fact here the order for mandate was simply the ministerial act of a deputy clerk. The action of the Court is embodied in the sentence at the end of its opinion, and this was duly recorded by the Clerk on August 8, 1944. It is hard to escape the conclusion that that action was the judgment.

This conclusion finds support in the rules of the Circuit Court of Appeals in effect at the time these transactions occurred. Rule 30 of the Rules of the Circuit Court of Appeals for the Second Circuit, contains the following provisions:

> Rule 30. Taxing Costs—Order—Mandate.
>
> 1. Upon the filing of any decision by this court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order * * *
>
> 2. A mandate may issue at any time on order of this court, but unless otherwise ordered shall issue at the expiration of fifteen days from the filing of the opinion of this court in the clerk's office unless delayed by the filing of the petition for rehearing.

> 3. If application for certiorari from the Supreme Court be made, application to stay the mandate shall be made only to this court, except in vacation when such application may be made to any judge of this court. * * *

The first paragraph of the rule goes a long way to show that the entry which the Clerk did make "forthwith" on August 8, 1944, was "the proper order", and, thus, the judgment. It is true that this rule provides that the order may be entered "at any later time, if the court thinks justice requires it". But the Court below took no action in this case to indicate that it thought that justice required any other action than that the Clerk should "forthwith" enter the order. Thus it appears that the order which the Clerk did enter "forthwith", taken in conjunction with the rule, is the order of the Court. This rule would seem to be similar in purpose and effect to the provision now included in Rule 58 of the Rules of Civil Procedure, last sentence.[5]

The contrast between "forthwith" in paragraph 1, relating to the "proper order", and "fifteen days" in paragraph 2, relating to the issuance of the mandate, is clear, and supports the conclusion, we submit, that the order which was in fact entered "forthwith" on August 8, 1944, was the judgment of the Court.

This is made even clearer when paragraph 3 of the rule is examined. This provides for a stay of the mandate where an application for certiorari is made. But an application for certiorari is filed to review a judgment, and if the order for mandate is itself the

[5] This reads as follows: "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry".

judgment; then there could be no stay of the mandate because the mandate would already have issued as a part of the judgment itself. This rule seems to make it very plain that the order for mandate is not the judgment. The mandate is something which issues, or is stayed, as the case may be, but *after* the judgment is entered. The entry which is the judgment, as provided in paragraph 1 of the rule, is that which is entered by the Clerk "forthwith" after the opinion is filed.

There may have been a carelessly accepted notion that the order for mandate constitutes the judgment in the Second Circuit. It is so stated in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936) §384. But no authority is cited for the point. Such a notion, or even a common understanding, cannot change the statutes of the United States. And no reason is perceived why the order for mandate should be the judgment in the Second Circuit Court of Appeals, but not in other Circuit Courts of Appeals, nor in this Court. On the contrary, there is every reason why the practice in such a matter should be uniform in all the Federal courts.

It would seem that the situation is quite similar to that which this Court passed upon in *Department of Banking* v. *Pink*, 317 U. S. 264. It had, prior to that decision, been widely assumed that the time for filing a petition for certiorari following a judgment of the New York Court of Appeals began to run at the time of the subsequent entry of a judgment by the lower Court on the remittitur. The Court held that this practice was improper and that the three months' period began with the entry of the order by the

Court of Appeals. This decision is very closely applicable to the present situation. The decision in the *Pink* case was that there is no reason for a different period of review for decisions of the New York Court of Appeals from that applied in reviewing the decisions of other State courts. For similar reasons, there would seem to be no reason why the period for review of Circuit Courts of Appeals' decisions should be three months in nine of the ten circuits in the country, but three months and twenty-one days (or some other number of days as the Clerk or his deputy may chose) in the Second Circuit.

The decision in *United States* v. *Hark*, 320 U. S. 531, is not to the contrary. There the order which the Court treated as the judgment was the deliberate judicial act of the judge himself, and it is apparent (see especially 320 U. S. at 535) that this was an important factor in the decision. Here, the order for mandate was the merely ministerial act of a deputy clerk. The only act by the Court itself was that stated in the close of the Court's opinion: "The order of the Tax Court is reversed." And this was duly recorded by the Clerk in his formal records on August 8, 1944. It seems hard to escape the conclusion that this was the judgment (the basis for a claim of *res judicata*, for example), and not some subsequent act done by a deputy clerk of the Court on his own motion.

This Court has recently decided that "it is the petitioner's burden to show affirmatively that we have jurisdiction". *Gorman* v. *Washington University*, 316 U. S. 98, 101. We submit that that burden has not been met in this case.

II.

In any event the petition should be denied.

The petition cites thirty-seven cases, and claims conflicts with many of them. It is obviously impossible to analyze each of these cases in the space properly to be devoted to the present brief. It is clear, however, that all of the claimed conflicts are argumentative. There is no such direct conflict as is the usual basis for the exercise of this Court's discretionary power of granting certiorari. On the contrary, it appears that the Government's complaint is that it has lost a case in the Court below and that it would like to have this Court grant it a further hearing with a re-examination of all the various cases in the field.

The Government's difficulty is that it has failed to keep its attention focused on the precise question actually raised by the facts of this case. By making that question much broader than it actually is, the Government raises conflicts in several directions. But when the narrow question actually involved is isolated and examined, it is plain that there is no conflict with any decision.

For example, there was no question in the Court below of capitalizing earnings, or of the other matters which are covered by the first specification of error and the first reason for granting the writ. It was not suggested to the Court below that Abercrombie and Fitch Company did not have earnings and profits available. That was not the issue there, and the opinion of the Court must be read in the light of the issues which were submitted to it.

The sole question before the Court below was whether the payment in question came within §112(c)(1) or within §112(c)(2) of the Revenue Act of 1936.[6] It has been expressly conceded by both sides throughout this case that the transaction in question *was* a recapitalization, and thus a reorganization. Its taxability is, therefore, governed by one or the other of the two paragraphs of §112(c), and by no other provision of the Code. It is governed by §112(c)(1), and the gain is taxable as a capital gain, unless §112(c)(2) applies. The latter paragraph does apply only if the payment "has the effect of the distribution of a taxable dividend." What the Court below did, was to construe those words in the light of the actual facts of this case. Decisions in other cases, involving other statutory provisions, and different facts, cannot be in conflict with this decision.

The important fact in the present case, which was not present, or was not relied on, in any of the other cases, is that in the present case the capitalization of the company was reduced by the transaction. The Government has consistently failed to appreciate this point, and its failure to appreciate it is apparent throughout the petition and its misconception of the decision below.

It was not argued in the Court below that the transaction was a partial liquidation. As pointed out, there never was any dispute as to what the transaction *was*. It *was* a recapitalization. The Court below understood this. Under the statute, however, it became necessary to determine the "effect" of the payment. Was its "effect" like that of an ordinary dividend, or was its "effect" like something else? What the Court below has decided is that in view of

[6] These are set out in full at pages 16-17 of the petition.

the actual facts of the case—the reduction in capital by the corporation, and the inability to pay dividends under State law—the "effect" of the transaction was not that of an ordinary dividend but was more nearly like that of a partial liquidation, which, whatever it may be, is not an ordinary dividend, and thus not enough to bring §112(c)(2) into operation. It is clear that there is no conflict on this point.[7] It is likewise clear, in the context of the issue and argument actually submitted to the Court below, that the Court did not decide that the transaction *was* a partial liquidation, but rather that the transaction was in "effect" more like a partial liquidation than it was like an ordinary dividend.

[7] For example, five cases are claimed as conflicts on page 9 of the petition. This is sweeping with far too broad a brush. One of these cases, *Commissioner* v. *Forhan Realty Corp.*, 75 F. (2d) 268 (C. C. A. 2d), was decided by the Court below. In it there was no issue as to the general applicability of §112(c)(2). Its general applicability was conceded, but *the Commissioner* argued that it was not applicable in the particular case since the recipient of the payment was a corporation which was not taxable on dividends received. The same question was involved in *Rose* v. *Little Investment Co.*, 86 F. (2d) 50 (C. C. A. 5th); and the issue in *Commissioner* v. *Owens*, 59 F. (2d) 597 (C. C. A. 5th), was similar. In *Love* v. *Commissioner*, 113 F. (2d) 236 (C. C. A. 3d), the reorganization was by sale of assets, and not by recapitalization. In *Campbell* v. *United States*, 144 F. (2d) 177 (C. C. A. 3d), the question was one of the earnings and profits of the successor corporation, and of the applicability of the rule of *Commissioner* v. *Sansome*, 60 F. (2d) 931 (C. C. A. 2d), certiorari denied, 287 U. S. 667, to the particular situation before the Court. There is clearly no such question here.

No one of these cases involved a situation like the present case where there was a recapitalization of a continuing corporation whose outstanding capital was reduced as a part of the transaction. The fact that a payment of cash *without* a reduction of capital may have the effect of the distribution of a taxable dividend does not require the same result where the payment *is* made in connection with a reduction of the capital of the corporation. What the Court below decided was that the latter sort of transaction was more like a partial liquidation than an ordinary dividend, and no Court has ever decided otherwise.

The soundness of this conclusion is supported by the whole background and purpose of the non-recognition provisions of §112. What is it that is not recognized under §112? Under §112(b)(3), what is not recognized is *gain or loss* on an *exchange* of stock or securities in connection with a reorganization. The basic transaction is an *exchange*. This is a typical capital transaction. It is just what happened here. The present taxpayer gave up securities, and received in exchange therefor other securities and cash. Thus, if there were no special statutes affecting the situation, there would clearly have been a *capital gain* on an *exchange*. See *Cullinan* v. *Walker*, 262 U. S. 134; *Marr* v. *United States*, 268 U. S. 536. But Congress has intervened in this situation and provided that no gain or loss shall be recognized on such an exchange in connection with a reorganization (§112(b)(3)), with the further qualification that if cash is received on the exchange, then the gain shall be recognized, but only to the amount of the cash received. Section 112(c)(1). But the gain so recognized still remains *capital gain* realized on an *exchange*! This is the basic, normal situation. Section 112(c)(2) then provides that if the cash received had "the effect of the distribution of a taxable dividend" it shall be taxed as a dividend. But it by no means follows, as the Government has argued, that all cash received in connection with a reorganization has the effect of a dividend. It depends upon the circumstances, and here the significant circumstance is that the payment was made in connection with a reduction of the corporation's capital, and thus has more the "effect" of a partial liquidation than of anything else.

Let us consider, for example, the case of a shareholder who had a *loss* on such an exchange as that involved here; that is, one whose cost basis was higher than the amount of securities and cash which he received in the exchange. Would the Government contend in such a case that the cash was nevertheless taxable as a dividend if the corporation had earnings and profits? This seems very unlikely, in the absence of special facts not present here. Yet, to argue that it is a dividend in the present case, means that some stockholders would receive a dividend and some would not, on the very same transaction, depending not on what was done, but on what their cost basis happened to be. The Court below was sound in avoiding such a construction of §112(c)(2).

Similarly, suppose that stock is called and redeemed. The gain in such a case is a capital gain. The present transaction is not essentially different from that. The Court below was correct in construing §112(c)(2) as not requiring a different result. At any rate, there is clearly no case in conflict with its decision on similar facts.

What the Government is apparently seeking is a decision that all liquidating distributions are taxable as ordinary dividends to the extent that the corporation has earnings and profits. See the reference to *Woodard* v. *Commissioner*, 30 B. T. A. 1216, on page 12 of the petition. That is obviously a large question, which should not be considered by this Court until it is squarely raised by a case actually involving that question, and in a situation where this Court has the benefit of full consideration of that point by the two tribunals below. It should not be passed upon in a case involving the narrow ques-

tion of the construction of § 112(c)(2) as applied to specific facts which are not the same as those which have been involved in any other case.

CONCLUSION.

It is doubtful whether this Court has jurisdiction of the petition. In any event, the petition presents no conflict and no issue of general importance, and should accordingly be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
HOLT S. MCKINNEY,
Counsel for the Respondent.

December, 1944.

APPENDIX.

Certificate of Clerk of Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE & TRUST COMPANY, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

I, ALEXANDER M. BELL, Clerk of the United States Circuit Court of Appeals, for the Second Circuit, do hereby certify that the docket entries in the above entitled case in this Court are as follows:

August	19, 1943	Filed record
August	31, 1943	Filed order extending time
October	7, 1943	Filed 24 copies, record
October	7, 1943	Filed brief, petitioner
October	22, 1943	Filed appearance, Commr by J. P. Wenchel, et al.
December	15, 1943	Filed appearance, Commr by S. O. Clark, Jr., et al.
December	15, 1943	Filed brief, respondent
January	3, 1944	Filed brief, petitioner, reply

August	8, 1944	Order reversed, A. N. Hand, *C. J.*
August	29, 1944	Filed order for mandate
August	29, 1944	Issued mandate
October	13, 1944	Certified record to Sol. Gen'l.
December	2, 1944	Filed notice.

Dated New York, December 8, 1944.

ALEXANDER M. BELL,
Clerk, United States Circuit Court
of Appeals.

[SEAL.]